

## FAX TRANSMITTAL

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To <i>Sally Sieracki</i>	From <i>Ticki Claiborne</i>
Dept./Agency	Phone # <i>(202) 287-1330</i>
Fax # <i>(509) 376-5378</i>	Fax #
NSN 7540-01-317-7388	5099-101 GENERAL SERVICES ADMINISTRATION

No. 94-13

Date August 25, 1994

LETTER

*Sieracki*  
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OPTIONAL FORM 99 (7-90)

## FAX TRANSMITTAL

# of pages ▶ 7

To <i>Jackie York</i>	From <i>Ticki Claiborne</i>
Dept./Agency	Phone # <i>(202) 287-1330</i>
Fax # <i>630-252-2361</i>	Fax # <i>(202) 287-1307</i>
NSN 7540-01-317-7388	5099-101 GENERAL SERVICES ADMINISTRATION

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Citation

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TitleAllowable costs and fixed-fee  
(Management and Operating Contracts)

Litigation and claims

- I. Purpose. The purpose of this AL is to establish interim policies on the reasonableness of Management and Operating ("M&O") contractor litigation costs.
- II. Background. Under the allowable costs clause of the Department's M&O contracts, attorneys' fees and other litigation costs are allowable only if reasonable and incurred in accordance with the Litigation and claims clause. The policies set forth below are a prospective reference to aid in Contracting Officers' determinations as to whether contractor litigation costs under M&O contracts are reasonable.  
  
The Department recognizes that these policies can be most effectively achieved for pending cases through the cooperation of the contractors and the law firms involved. The Department intends to work closely with the contractors to ensure a smooth implementation that will not compromise the defense of pending matters.
- III. Guidance. These policies apply to reimbursement of present and former M&O contractors for amounts paid to outside law firms and consultants ("outside firms") in connection with litigation to which the contractor is a party, except to the extent the contractor's own litigation procedures or current retainer agreements contain more cost-restrictive provisions. The Contracting Officer, or his or her designated representative (hereinafter "Contracting Officer"), may, after consultation with Department counsel, authorize an exception to the policies described below based upon economy, the interests of the Government, or other good cause. These policies may be modified, from time to time, as the Department determines appropriate. The Contracting Officer has authority to exclude from these policies cases whose expected costs of defense are less than \$25,000 and/or routine matters

handled by outside counsel retained and supervised by an insurance carrier.

**A. Interim Policies**

Contracting Officers shall refer to and consider the following policies in determining the reasonableness of contractor litigation costs. The failure to specify or describe a particular category of cost in paragraphs III.A.1. through III.A.10. does not imply that such category of cost is either allowable or unallowable.

**1. Terms Of Engagement**

In order for costs incurred by an M&O contractor for an outside firm to be considered reasonable, they shall be incurred in accordance with the terms of engagement between the contractor and the outside firm which have been approved by the Contracting Officer. The terms of engagement between the contractor and the outside firm shall incorporate and include the policies included in paragraphs III.A.1. through III.A.10. of this AL. The terms of engagement shall also provide that the outside firm will comply with the Department's Litigation Management Procedures, which, among other things, require a Staffing and Resource Plan (for significant cases), periodic case assessments and budgets, adequate audit provisions, and notification to the Department and the contractor of any significant change in the Staffing and Resource Plan.

**a. Bills and Invoices**

All bills and invoices shall reflect the information and contents set forth in the model format of Attachment A. Any bill or invoice shall also contain a certification signed by a representative of the outside law firm to the effect that:

"Under penalty of law, [the representative] acknowledges the expectation that the bill will be paid by the contractor and that the contractor will be reimbursed by the Federal Government through the U.S. Department of Energy, and, based on personal knowledge and a good faith belief, certifies that the bill is truthful and accurate, and that the services and charges set forth herein comply with the terms of engagement and the policies set forth in [this Acquisition Letter], and that the costs and charges set forth herein are necessary for the litigation."

b. Audit

All terms of engagement must contain a provision for auditing expenditures under the terms of engagement to determine and ensure compliance with the terms of engagement and the provisions of the prime contract, and to determine the accuracy of any bill or invoice for the services of the outside firm. The provision shall include a statement that:

- o [The outside firm] expects that the costs of the services rendered under the terms of engagement will be paid by the contractor and that the contractor will be reimbursed by the Federal Government through the U.S. Department of Energy.
- o [The contractor] and the Department of Energy, its designated representative, and the General Accounting Office, have the right upon request, at reasonable times and at reasonable locations, to inspect, copy, and audit all records documenting billable fees and costs under the terms of engagement, the systems employed by [the outside firm] to capture, record, and bill the fees and costs, and any other records relevant to the representation by the outside firm under the terms of engagement.
- o [The outside firm] will retain all such records for a period of three (3) years after the final payment under the terms of engagement.
- o The provision does not constitute a waiver of any applicable legal privilege, protection, or immunity with respect to disclosure of these records to third parties.

2. FEES

In determining whether fees or rates charged by an outside firm are reasonable for purposes of approving a contractor's terms of engagement with an outside firm, the Contracting Officer shall consider whether the contractor sought the lowest reasonably achievable fees or rates (including any currently available or possibly negotiable discounts) from the outside firm, whether the contractor considered rates available from other firms providing comparable services, and whether the contractor considered alternative rate structures such as flat, contingent, and other innovative proposals.

### 3. PROFIT AND OVERHEAD

The rate or fee structure shall include all outside firm "overhead" and "profit," and, therefore, any additional overhead or profit charged by the outside firm shall be considered unreasonable. Similarly, any markups by the outside firm for supplies or services procured from third parties would be unreasonable. For instance, only the actual costs of messenger services shall be allowed, whether the service was performed by the outside firm or a third party. Additionally, any interest the contractor incurred on any outstanding (unpaid) bills from outside firms is not reimbursable under the DEAR.

### 4. TRAVEL AND RELATED EXPENSES

Charges for air travel shall be the actual cost, not to exceed the coach class fare. Charges for local ground travel shall be the actual cost of the taxi service, or the existing Internal Revenue Service's mileage deduction allowance if the person drives his or her own automobile. Charges billed for meals, lodging and rental cars must be moderate. The rates set forth in the Federal Travel Regulations will be deemed presumptively reasonable. See 41 C.F.R. ch. 301. Charges for luxury hotels, cars, or services such as movies and fitness facilities are neither necessary nor reasonable.

Travel by more than one person from an outside law or consulting firm to attend a deposition, court hearing, interview, or meeting outside the person's home office shall not be considered reasonable except when authorized by contractor counsel in accordance with procedures agreed upon with Department counsel.

Any travel time may be reimbursed at a full rate for the portion of time during which the outside firm performs work for the contractor. For air travel, any remaining travel time during normal working hours shall be reimbursed at 50 percent. In no event is travel time for time during which work was performed for other clients reimbursable.

### 5. COPYING

Copying charges shall not exceed ten cents a page, unless supported by a cost study and approved in advance by the Contracting Officer. Copying projects where volume would generate substantial savings should be sent to outside vendors when practicable and cheaper. As with costs for all supplies and services, the Contracting Officer should look to local commercial rates as a benchmark.

#### **6. TELEPHONE CHARGES AND FAXES**

Charges billed for toll or long distance calls, including facsimile/telecopier transmissions, shall not exceed the actual charge for each call, with no overhead or surcharge adjustment.

#### **7. COMPUTER TIME**

Charges for computer-assisted research shall not exceed the actual cost, with no overhead or surcharge adjustments.

#### **8. OVERTIME AND CERTAIN TEMPORARY EMPLOYEES**

Secretarial and clerical overtime or costs of temporary support personnel billed by the outside firm shall not be charged, unless the Contracting Officer approves such overtime or temporary support personnel or the cost is caused or required by an emergency situation not of the contractor or the outside attorney's making. Time charged by summer associates should be scrutinized for its efficiency and consistency with the Staffing and Resource Plan.

#### **9. EXPERTS EMPLOYED BY DOE CONTRACTORS**

If the contractor or outside counsel wishes to retain as a consultant in a matter an employee of another contractor of the Department of Energy, the requesting contractor must receive prior approval from the Department of Energy, which will attempt to furnish the expert directly through the contractor that currently employs the potential consultant. This policy does not alter any applicable provisions of the prime contract with either the requesting or the employing contractor.

#### **10. SPECIFIC NON-REIMBURSABLE COSTS**

The contracting officer shall not consider for reimbursement any proposed costs by the contractor for any direct costs incurred by outside firms for the following items: entertainment; alcoholic beverages; secretarial or clerical support time (except as provided under paragraph 8, above); word processing; computers or general application software; client development and related activities; trade publications, books, treatises, background materials, and other similar documents; professional/educational seminars and conferences; preparation of bills; parking fines or any other fines or penalties for illegal conduct; and food, beverages and the like when the attorney or consultant is not on travel status and away from the home office. An exception may be made, however, for

reasonable expenses for working meals during an in-house meeting not in excess of \$10 per person. No outside firm's bills are to contain any items representing disbursements made for the benefit of the contractor's employees, such as meals or lodging for contractor's current personnel (other than conference meals at which contractor personnel are present under this paragraph).

IV. Effective Dates. These policies are effective with respect to determinations of reasonableness and allowability of costs for services rendered and expenses incurred:

1. on or after October 1, 1994, for all class actions;
2. on or after November 1, 1994, for all non-class actions commenced on or after October 1, 1994; and
3. on or after February 1, 1995, for all non-class-action litigation commenced before October 1, 1994.

V. Expiration Date. The Department is seeking public comment on these policies. This AL will remain in effect on an interim basis until the Department takes further action after reviewing any public comments on these policies.

U.S. DEPARTMENT OF ENERGY  
OFFICE OF GENERAL COUNSEL  
CONTRACTOR LITIGATION COSTS  
MODEL BILL FORMAT AND CONTENTS

ATTACHMENT A

I. FOR FEES

<u>Date of Service</u>	<u>Description of Service</u> (See Note 1 below)	<u>Name or Initials of Attorney</u>	<u>Approved Rate</u>	<u>Time Charged</u>	<u>Amount (Rate x time)</u>
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II. FOR DISBURSEMENTS

<u>Date</u>	<u>Description of Disbursement</u> (See Note 2 below)	<u>Amount</u>
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Note 1: Description of Service: All fees must be itemized and described in sufficient detail and specificity to reflect the purpose and nature of the work performed (e.g. subject matter researched or discussed; names of participants of calls/meetings; type of documents reviewed).

Note 2: Description of Disbursement: Description should be in sufficient detail to determine that the disbursement expense was in accordance with all applicable DOE policies on contractor litigation costs and the terms of engagement between the contractor and the law firm (e.g. if copying charges, include number of pages copied and cost per page).